IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., Plaintiff, v. INTERDENT SERVICE CORPORATION, Defendant.	Case No. CV 03-450-E-LMB ORDER
INTERDENT SERVICE CORPORATION, Third-Party Plaintiff, v. POCATELLO DENTAL GROUP, P.C., et al., Third-Party Defendants.	

Currently pending before the Court is Defendant/Third-Party Plaintiff's Motion and Application for a Temporary Restraining Order (Misner Noncompete) (Docket No. 114). Having carefully reviewed the record and considered the arguments of the parties, the Court enters the following Order.

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I.

BACKGROUND

Third-Party Defendant Dr. Larry Misner, Jr. ("Misner") was, until recently, a member of Pocatello Dental Group ("Group"), a group of dental professionals who provide a variety of dental services to patients residing in eastern Idaho. In October 1996, the Group entered into a management agreement with an entity that eventually became known as Interdent Services Corporation ("ISC"). Under the Agreement, ISC's predecessor in interest acquired all of the Group's nonprofessional assets, as well as the right to provide management services for the Group, in exchange for $2.8 million, of which Misner received $400,000 cash. As part of the deal, Misner and the other shareholders of the Group agreed to a non-compete clause, under which they agreed not to practice dentistry within a twenty (20) mile radius for two (2) years after leaving employment with ISC. In addition, the clause indicated that, should they leave ISC, Misner and the other shareholders were not to solicit former patients nor offer employment to persons employed by ISC.

The relationship between ISC and the Group deteriorated, resulting eventually in the present suit being filed on October 9, 2003 in an Idaho state district court. Misner subsequently departed from the Group on February 25, 2004 and began practicing with Dr. Larry Bybee, another dentist formerly associated with the Group. Initially, Misner practiced solely in Burley, Idaho, a community located outside of the non-compete zone, but the record establishes that Misner and Bybee had been obtaining funding since before January of 2004 to open their own practice in Pocatello, Idaho. *Bybee Deposition*, pp. 7, 9 (Docket No. 133). Thus, by the time Misner left the Group, he and Bybee had leased space in Pocatello, approximately two (2) miles

from the ISC office, *id.* at 9, and in March they began remodeling and prepared to open a new office under the assumed business name "Kidds Dental."[1] *Id.* at 4-5. As part of those preparations, they engaged another company, Orthodontic Centers of America, to provide management services under an arrangement similar to ISC's contract with the Group. *Id.* at 12. Sometime in April or May of 2004, Misner began requesting dental records of former patients from ISC and, on June 11, 2004, he began seeing patients at Kidds Dental in Pocatello. *Id.* at 4; Webb Affidavit, p. 2 (Docket No. 117). Misner's counsel confirmed to ISC that Misner was practicing in Pocatello and intended to continue doing so pending a ruling to the contrary from the Court. *Memorandum in Support of Motion for TRO*, p. 4 (Docket No. 115).

II.

PROCEDURAL BACKGROUND

The instant motion seeking a temporary restraining order was filed by ISC on June 2, 2004 in an effort to compel Misner to comply with the non-compete terms of the Agreement. Specifically, ISC seeks a restraining order prohibiting Misner from (1) practicing dentistry for two years within twenty miles of ISC's office, (2) soliciting ISC's or the Group's patients, clients, providers, or customers, or (3) soliciting or making offers of employment to their employees. *Motion for Temporary Restraining Order*, p. 2 (Docket No. 114). In support of its motion, ISC filed a Memorandum in Support of Motion for TRO (Docket No. 115), accompanied by, *inter alia*, a copy of the non-compete agreement, *Webb Affidavit*, Ex. 1 (Docket No. 117), and

[1]According to Dr. Larry Bybee's deposition, Misner is under contract with Valley Dental, d/b/a Kidds Dental, a corporation owned solely by Bybee. *Bybee Deposition*, p. 5 (Docket No. 133). Misner, an officer of the aforementioned entity, is scheduled to work three days a week in the Pocatello office, and usually works four to five days a month at the Burley office. *Id.*

a compelling letter, *id.* at Ex. 3, written to Misner in early 2003 by Dr. Porter Sutton, another shareholder dentist, concerning possible approaches to resolve their problems with ISC. In response, on June 25, 2004, Misner filed a Memorandum in Opposition to Motion for TRO (Docket No. 123). On June 28, 2004, ISC submitted a Reply in Support of Motion for TRO (Docket No. 125), along with, *inter alia*, excerpts from the depositions of Dr. Bybee and Dr. Gregory Romriell. *Kaplan Affidavit*, Exs. 1 and 2 (Docket No. 126).

On June 30, 2004, the Court held a hearing and heard oral argument, after which the parties were allowed to supplement existing discovery and submit any accompanying briefing. *Minute Entry* (Docket No. 127). Accordingly, on July 8, 2004, Misner filed a Supplemental Memorandum in Opposition to Motion for TRO (Docket No. 132), along with a full transcript of the Bybee Deposition (Docket No. 133). Third-Party Defendants Dwight Romriell, Gregory Romriell, Errol Ormond, and Arnold Goodliffe, all members of the Group, also submitted a Supplemental Filing on Motion for TRO (Docket No. 134), along with several additional portions of the deposition of Gregory Romriell. *Id.* Misner then filed a Supplemental Memorandum in Support of Motion for TRO (Docket No. 140) and the Webb Affidavit (Docket No. 141), which included the non-compete agreements of Dr. G. Romriell and Dr. Goodliffe. The record is now sufficiently complete and the issue is ripe for resolution.

III.

STANDARD OF REVIEW

Federal courts have authority to grant a temporary restraining order under Federal Rule of Civil Procedure 65. In the Ninth Circuit Court of Appeals, courts apply the same standard when ruling on a request for a temporary restraining order under Fed. R. Civ. P. 65(b) as is applied to a

request for preliminary injunctive relief under Fed. R. Civ. P. 65(a). *See Byron v. City of Whittier*, 46 F.Supp.2d 1032 (C.D. Cal.1998) (applying the standard for a preliminary injunction under *International Jensen v. Metrosound U.S.A.*, 4 F.3d 819 (9th Cir. 1993) to a request for a temporary restraining order). To prevail on a motion for a preliminary injunction or a temporary restraining order, the movant must demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits are raised and the balance of hardships tips sharply in movant's favor. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115,1119 (9th Cir. 1999). These two alternatives represent "extremes of a single continuum," rather than two separate tests. *Id.* Therefore, the greater the probability of success, the less hardship the movant must show. *See id.*

IV.

ANALYSIS

A. Probability of Success on the Merits

Both parties, throughout their briefing and in oral arguments, have focused much of their effort on proving the likelihood that their claims will succeed. Accordingly, the Court will first turn its attention to those arguments relating to the overall merits of the instant action.

ISC argues that its claim is likely to succeed because Misner is in clear breach of the Agreement. *Memorandum in Support of Motion for TRO*, p. 6 (Docket No. 115). ISC emphasizes that the terms of the non-compete agreement are plain and unambiguous, and cites to several cases in which non-compete agreements with similar terms have been found reasonable and consistent with public policy. *Id.* at 6-7. ISC also claims that if Misner's misconduct

continues, it will suffer irreparable injury through loss of business, and will probably have to close its Pocatello office. *Id.* at 2, 8.

In contrast, Misner argues that the non-compete agreement is unenforceable as a matter of law, and that ISC therefore cannot possibly succeed on the merits. *Memorandum in Opposition to Motion for TRO*, p. 7 (Docket No. 123). Specifically, Misner claims that, as a matter of public policy, a non-professional entity cannot enforce a non-compete agreement against a professional. *Id.* at 8. Misner cites *Worlton v. Davis*, 249 P.2d 810 (Idaho 1952), wherein the Supreme Court of Idaho refused to enforce a non-compete agreement against a doctor because the entity seeking to enforce it included one partner who was not a doctor. Further, Misner argues to the extent that the non-compete agreement is between professionals, *i.e.* between Misner and the Group, ISC has no standing to enforce it, since it is at most a third-party beneficiary whose only relationship to Misner is as an independent contractor to his former employer (the Group). *Memorandum in Opposition to Motion for TRO*, p. 5 (Docket No. 123).

In its reply, ISC argues that while it is a third party to the employment agreement between Misner and the Group, the non-compete agreement ran directly between ISC and Misner. *Reply in Support of Motion for TRO*, p. 3 (Docket No. 125). ISC cites a number of cases in which non-compete agreements have been enforced, and raises the economic realities of the initial transaction, as well as the actions of other dentists who have left the Group, to demonstrate that both parties perceived the non-compete agreement to be valuable and necessary to the overall agreement. *Id.* at 4-7. In particular, ISC claims that it has a direct interest in securing the non-compete agreement, not only on behalf of the other dentists employed by the Group (with whom

Misner would ostensibly be in direct competition as a dentist),[2] but also in its own right as a provider of dental office management services, as illustrated by the fact that Misner's new practice has already contracted with another provider, Orthodontic Centers of America, to provide the same kinds of services for Kidds Dental that ISC provides for the Group. *Id.* at 7. Furthermore, even without being engaged in the practice of dentistry, ISC owns assets which are used in the practice of dentistry, and whose value is thereby affected by competing dental offices. *Id.* at 3.

ISC correctly points out that in the *Worlton* case relied upon by Misner, it was the underlying employment agreement, rather than the non-compete agreement, that was found to violate public policy. *Id.* at 5; *see Worlton*, 249 P.2d at 813. The employment agreement in that case was invalid because it attempted to subject a doctor to the control of a non-doctor employer, essentially allowing the non-doctor to practice medicine through his employee. *Id.* In the instant case, however, as ISC correctly points out, the non-compete agreement here seeks to control only *where* Misner practices dentistry, rather than the *manner* in which he does so, and the underlying employment agreement purportedly gives ISC no control over the practice of dentistry.[3] *Reply in Support of Motion for TRO*, pp. 4, 7 (Docket No. 125).

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[2] Misner makes much of the fact that he treats only children, while the Group dentists see primarily adult patients. *See, e.g., Memorandum in Opposition to Motion for TRO*, pp. 12-13 (Docket No. 123). While this distinction may have bearing on whether Misner's competition is harmful to ISC, the agreement itself deals more generally with "providing the professional services of dentistry." *Webb Affidavit*, Ex. 1, p. 2 (Docket No. 117). Therefore, the distinction has no bearing for purposes of the pending motion on whether Misner has violated the non-compete clause, nor is the difference marked enough to affect whether ISC was sufficiently related to Misner to be able to make, or enforce, a non-compete agreement.

[3] Of course, this does not mean that ISC did not in fact exert control over the manner in which Misner and the other dentists practiced dentistry. Indeed, as will be explained later, that will likely be a question of fact to be resolved in this case. However, for purposes of the pending motion, unlike the agreement in *Worlton*, this agreement does not facially violate public policy.

Considering the arguments of the parties at this stage of the proceedings relating to the underlying merits of the case, it appears to the Court that the non-compete agreement between ISC and Misner may ultimately be found enforceable and valid as written. Misner presents no applicable case law to refute ISC's ample authorities supporting the validity and reasonableness of non-compete agreements similar to the one at issue, nor does he present any substantial public policy reasons against enforcing such agreements.

The Court, however, makes no finding one way or the other on this issue at this time, except to say that Misner has not shown that the non-compete agreement is facially invalid, although there may be serious questions whether it is reasonable as applied. *See, e.g., Pinnacle Performance, Inc. v. Hessing*, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (citing Restatement (Second) of Contracts § 188 (1981) (noting that a covenant not to compete must be reasonable as applied to the parties and to the public)). Even though it appears valid on its face, events and circumstances subsequent to the formation of the contract raise questions as to the ultimate applicability of the agreement to Misner's situation.

Misner raises facts and legal arguments tending to establish that the non-compete agreement, even if it is facially valid, may not prevent him from practicing within the non-compete zone. First, although the management agreement between ISC and the Group specifically provided that ISC would have no control over the practice of dentistry, it is argued that ISC has effectually exercised control even though it could not contractually do so. The record contains claims that ISC failed to provide adequate resources and support to allow the dentists to do their job in the manner they thought was proper. *See, e.g., Supplemental Filing by Third-Party Defendants Romriell, Romriell, Ormond, and Goodliffe on Motion for TRO* (Docket

No. 134). If it were determined that ISC's control of the equipment, supplies, patient lists, etc. constituted control over the manner in which the Group dentists practiced dentistry, then, similar to *Worlton*, the entire management arrangement, including the employment contracts and the non-compete covenants, could be determined to be unenforceable as an illegal practice of dentistry by a non-dentist. *See Worlton*, 249 P.2d at 813. In other words, under those circumstances it could reasonably be argued that the management agreement would be illegal, not necessarily on its face, but in practice, and the non-compete covenant, arguably, would therefore be unenforceable as a component of that contract.[4] *See id.*

A second argument, drawing on the same factual claims, is that ISC's conduct could be characterized as a constructive without-cause termination of Misner's employment, even though he was never formally fired by the Group.[5] *See Deposition of Larry Bybee*, pp. 11-12 (Docket No. 133). Although Misner himself does not allege a constructive firing, supplemental briefing filed by several other Group dentists raises the argument on equitable grounds, *i.e.* that to issue a

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[4] On this point, ISC later argues that, since the non-compete agreement was never incorporated into the management agreement, the parties did not intend performance under the management agreement to be pertinent to the parties' duties under the non-compete agreement. *Supplemental Memorandum in Support of Motion for TRO*, pp. 6-7 (Docket No. 140). However, as Misner points out, "a covenant not to compete must be ancillary to a lawful contract." *Pinnacle Performance, Inc. v. Hessing*, 17 P.3d 308, 311 (Idaho Ct. App. 2001) (citing *McCandless v. Carpenter*, 848 P.2d 444, 447 (Idaho Ct. App. 1993)). *Memorandum in Opposition*, p. 9 (Docket No. 123). Resolution of this issue may eventually be necessary, but for now, the Court finds only that the non-compete agreement is sufficiently related to the management agreement for purposes of this pending motion to raise a question as to its ultimate validity.

[5] The non-compete clause in the employment agreement used by the Group was apparently subject to a condition that each dentist be scheduled three or more days per week. *See Deposition of Larry Bybee*, p. 12 (Docket No. 133). Bybee testifies in his deposition that he and Misner had to see fewer patients because ISC failed to provide adequate staff. *Id.* No such condition appears in the language of the ISC non-compete agreement, although the condition in the employment agreement or some other condition may apply implicitly or by reference or incorporation. This issue cannot appropriately be resolved at this time, but it is sufficient to observe that uncertainty remains as to whether the non-compete clause, even if valid, is, by its own terms, binding on Misner, depending on how ISC's conduct is characterized, and whether the apparent condition in the employment agreement with the Group applies also to the non-compete agreement with ISC.

preliminary injunction against Misner and prevent him from practicing dentistry at his new practice, when ISC had prevented him from doing so with the Group, would amount to allowing ISC to benefit from its own wrongs. *See Supplemental Filing by Third-Party Defendants,* pp. 3-4 (Docket No. 134).

In addition to these specific arguments, Misner and the other dentists have alleged a number of other contractual violations relating more generally to the management agreement as a whole. *See, e.g., Amended Complaint* (Docket No. 113). Naturally, ISC proposes a very different interpretation of the parties' conduct. It is not necessary at this time to go into great detail about these factual issues, except to recognize that ultimately the applicability of the non-compete agreement rests on a number of complex issues and factual findings that are beyond the scope of the instant proceedings on the motion for a temporary restraining order.

While both sides have raised and presented serious questions going to the merits of the action, the Court places its primary focus on whether ISC has raised sufficient questions going to the merits of the claims and whether the balance of hardships tips sharply in its favor. Any determination of whether ISC is likely to prevail on the merits will be addressed below after the Court has considered the legal arguments that have been raised by the parties. Indeed, the instant action illustrates the need for an alternative standard for preliminary injunctions: in complex cases like this, both sides essentially argue that they should prevail, with the result that much of the parties' respective arguments focus on issues that cannot properly be resolved within the context of a motion for injunctive relief.

Many of these arguments on the merits are discussed here, not in an attempt by the Court to resolve the issues, but rather to illustrate that serious legal and factual questions remain to be

resolved before the ultimate validity and applicability of the non-compete agreement can be determined. Accordingly, to qualify for a temporary restraining order, ISC must show that the balance of hardships tips sharply in its favor.

B. Balance of Hardships

Balancing the hardships involves an assessment of the effect on each party of granting or denying the injunction. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987). ISC presents a number of harms that it claims will result if Misner is allowed to continue operating within the non-compete zone.

First, ISC argues the very harm to which the non-compete covenant was primarily addressed is that it will likely suffer a decline in business at its Pocatello office. *Memorandum in Support of Motion for TRO*, p. 5 (Docket No. 115). In addition to the general harm that comes from having to compete against more dental practices, ISC alleges that direct competition from Misner hurts its business in a way that is specifically harmful to it, since many of ISC's patients have chosen to follow Misner to his new practice. Indeed, ISC claims that it has already lost more than one hundred patients to Misner, whose practice (including Bybee) generated about one and one-half million dollars in revenues annually for ISC before Misner left the Group. *Reply in Support of Motion for TRO*, p. 9 (Docket No. 125).

Related to this potentially very real harm is ISC's second argument, that Misner will, at his new practice, utilize valuable trade secrets and proprietary business knowledge gained during his time with ISC, resulting in irreparable harm to ISC's competitive position. *Supplemental Memorandum in Support of Motion for TRO*, p. 4 (Docket No. 140). In ISC's view, this concern

is heightened by the fact that Misner's new office is managed by a competing dental management company. *Id.*

Third, and most significantly, ISC claims that Misner's decision to move into the non-compete zone, if allowed to stand, could open the floodgates, so to speak, by encouraging other dentists bound by the same Agreement to similarly violate its terms and practice independently within twenty miles of ISC's Pocatello clinic. *Id.* at 5. The Court concludes that ISC's concern is well-founded and that the instant action will thus become a test case for the other Group dentists. *Id.* at 6. Indeed, ISC claims that two other dentists bound by similar non-compete contracts, Gregory Romriell and Errol Ormond, are in the process of obtaining new office space in Pocatello in which to open a competing dental practice. *Id.* at 5. Neither of them has answered ISC's requests for assurances of intent to comply with their own non-compete agreements, a fact which, according to ISC, suggests they are just waiting to see the outcome of Misner's attempt to violate his non-compete agreement before following his lead. *Id.* The Court concludes that ISC's concerns in this regard are reasonable and justified.

To the extent more dentists leave the ISC Pocatello practice, it will lose all of the associated revenue from those dentists, while still bearing the fixed costs of that office, causing its current operating losses to accumulate even greater amounts. Given the economic losses it is allegedly experiencing now as a result of the dentists who have left so far, ISC claims that, if Romriell and Ormond leave, it will have no alternative but to close its Pocatello office. *Id.*

ISC claims that its loss of business and ultimate closure constitute irreparable harm. As confirmation of the irreparable nature of the harm ISC alleges, ISC points out that Misner

consented to injunctive relief in the non-compete agreement, in express recognition of the inadequacy of a strictly legal remedy to enforce the contractual rights of the parties. *Id.* at 4.

ISC also suggests that the restraint would place minimal hardship on Misner, since he would still be free to practice anywhere outside of Pocatello, including at his Burley office, or even to return to the Group. *Reply in Support of Motion for TRO*, pp. 9-10 (Docket No. 125). ISC points out that it is not requesting anything to which Misner has not already consented, *id.* at 5-6, and emphasizes that other Group dentists who have left ISC have chosen to abide by the agreement and practice outside of the non-compete zone. *Id.* at 6-7.

In response, Misner emphasizes that enjoining an individual dentist from practicing dentistry in Pocatello creates a greater hardship than decreasing the profit margin of a large corporation with respect to just one of the many offices they operate. *Memorandum in Opposition to Motion for TRO*, p. 13 (Docket No. 123).[6]

It cannot be doubted that ISC's alleged harms, if they materialize, would be substantial. However, the purpose of injunctive relief is to avoid *irreparable* harm, that is, harm that cannot be adequately compensated through legal remedies. *See Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 471 (9th Cir. 1984). "Mere financial injury," even if it is substantial, "will not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation." *Id.* In this case, the harms claimed by ISC appear to be primarily financial in nature. ISC has made no allegations regarding the inability of Misner to pay damages in the event he should be found liable to ISC. Thus, the first issue to be resolved is whether the harms alleged

[6] In addition to the personal impact on Misner's practice, Misner also alleges an adverse impact on the public, who may not have access to emergency pediatric dental care in the absence of Kidds Dental. *Supplemental Memorandum in Opposition to Motion for TRO*, p. 4 (Docket No. 132). The evidence presented by Misner on this point is not particularly persuasive, but it is not important to make that determination at this time.

by ISC are irreparable, that is, whether the injury alleged by ISC is of such a nature that it cannot be adequately compensated by money damages. If so, then ISC must still show that the resulting hardship sharply outweighs any hardship to Misner and the public caused by granting the motion.

With respect to ISC's first request (*i.e.*, that Misner be enjoined from practicing in Pocatello), the Court concludes that ISC has not made an adequate showing sufficient to grant injunctive relief. While ISC's claims are not insignificant, ISC's size and the number of other offices it operates distinguish it from a sole practitioner whose entire livelihood comes from a single office. ISC presents no evidence to suggest that even a complete closure of their Pocatello office would cause the company injury that could not be compensated with an award of money damages from Misner. In the Court's view, ISC has failed to demonstrate significant irreparable harm and thus the vast majority of potential injuries that ISC could claim constitute lost revenues and expected profits. While ISC's allegations could represent serious economic harm, there is little indication of any unique or subjectively valuable asset worthy of special protection in the form of injunctive relief. "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Services Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988), *citing Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

Moreover, even if ISC's injuries were irreparable, the requested relief would not significantly mitigate them. ISC makes much of the revenue lost as a result of Misner leaving, but even if ISC's reduced profitability is, as ISC claims, largely due to Misner's leaving, it does not follow that granting the requested injunctive relief would somehow restore that lost

profitability or protect ISC from even greater revenue reductions in the future. The harm alleged by ISC stems primarily from Misner's decision to leave, not from his decision to return to Pocatello to practice. Significantly, ISC's reduced profitability is at least partly attributable to other dentists from the group, who, like Misner, also left ISC, but unlike Misner, chose to remain outside of the non-compete zone. Indeed, as discussed below, while an injunction might reduce the chance of other dentists leaving, it cannot stop them from leaving. The damage appears to have been caused, not by the competition, but rather by the departure.

The same analysis applies to ISC's fears of an impending dental exodus. While ISC focuses much of its argument on the harms resulting from dentists leaving, it does not differentiate those general harms from the specific effects of them choosing to violate the non-compete covenant. The connection between ISC's allegations and the requested relief is imprecise on both sides, since granting it would not necessarily keep other dentists from leaving, nor would denying it necessarily result in a mass desertion. Indeed, several dentists have left already, and ISC has presented little to demonstrate that they would keep the Pocatello office open if the requested motion were granted.

Denial of a temporary restraining order is not the same result as invalidating a contract. Even if a refusal to grant the requested injunction diminishes the short-term deterrents perceived by the other dentists, ultimately they may also consider the long-term potential that the contract will be upheld and enforced in the end. Allowing Misner's conduct to go unrestrained may reduce the deterrent effect, but this falls far short of the *carte blanc* permission to compete that ISC envisions. The causal link is simply too attenuated to allow ISC's concern of possible shutdown to outweigh the certainty of Misner's prospects of leaving Pocatello if the injunction is

granted. The Court also notes that most of the evidence in support of the alleged floodgate effect on other dentists consists of the testimony and opinions of interested parties. *See, e.g.*, *Memorandum in Support*, p. 5 (Docket No. 115); *Affidavit of Kevin Webb*, p. 3 (Docket No. 117). But, again, even if ISC's allegations were more firmly established in this regard, an injunction would still be inappropriate since ISC has not shown that the resulting harm would not be adequately compensable through an award of money damages.

ISC's allegations regarding Misner's potential use of proprietary trade secrets are more akin to the types of harms for which an injunction would be appropriate. However, it appears to the Court that the requested relief would do little to address the alleged injury, since Misner will possess the same information regardless of whether or not he is within the twenty (20) mile radius. Even if the injunction were issued as requested, it would not prevent Misner from using that same information in Burley, for example. If there is some fact-sensitive reason why the disputed trade knowledge will be significantly more harmful in Pocatello than elsewhere, that claim has not been established. In the Court's view, that issue is better resolved as an element of damage at trial.

Finally, it is necessary to address ISC's argument that Misner has consented to injunctive relief. The contractual provision to which ISC refers, *see Webb Affidavit*, Ex. 1, p. 3 (Docket No. 117), may have bearing on the remedies available once the case has been decided on the merits, but is not determinative of the instant motion. The consent to injunctive relief, like all of the other terms of the agreement, stands or falls with the validity and application of the agreement itself based on both a legal application and factual determination. If the contract is found to be unenforceable, then so is the consent, and vice-versa. The contract does suggest that the parties

saw the potential for under-compensation, but it is not conclusive. At most, it provides that, if ISC is found to have enforceable rights under the contract, those rights may be enforced by injunction. Contrary to what ISC asserts, the clause has no determinative bearing on whether ISC has enforceable rights under the contract at this stage of the proceedings.

C. Conclusion

Ultimately, the arguments and evidence provided by ISC are insufficient to establish anything beyond financial injury. Misner's decision to practice within the Pocatello area may well harm ISC, but there is little reason to believe that those injuries will not be compensable through legal remedies and an award of monetary damages, nor is there sufficient evidence to suggest that the desired temporary restraining order would significantly mitigate or cancel those harms. In particular, much of the harm and damage alleged by ISC appears to stem from Misner's departure, rather than from his competition.

Obviously, Misner, or any other party to this action, will act at his own peril by setting up a dental practice in Pocatello, or by soliciting or accepting referrals of ISC patients, children or adults, from the Group, or soliciting to hire Group or ISC employees, at any time less than two years following departure from the Group. However, in the event Misner is found to be in violation of a valid non-compete agreement and ISC is found to have suffered damage, it has an adequate remedy at law which can be adequately compensated by an award of monetary damages against Misner, or others, who may be found to be in violation of the agreement.

V.

ORDER

For the reasons set forth herein, Defendant/Third-Party Plaintiff's Motion and Application for Temporary Restraining Order (Misner Noncompete) (Docket No. 114) is DENIED in part, and GRANTED in part, as follows:

ISC's first request, that Misner be restrained from practicing dentistry within twenty miles of ISC's Pocatello office, is DENIED pending a determination on the merits of the claims.

ISC's second request, that Misner be enjoined from soliciting ISC's or the Group's patients, clients, providers or customers, or soliciting or making offers of employment to their employees, is GRANTED.

DATED this 4th day of August, 2004.

LARRY M. BOYLE
UNITED STATES DISTRICT COURT

wm

United States District Court
for the
District of Idaho
August 5, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:03-cv-00450

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

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____ Judge David O. Carter
____ Judge John C. Coughenour
____ Judge Thomas S. Zilly

Cameron S. Burke, Clerk

Date: 8-5-04

BY: WM
(Deputy Clerk)